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THE FOURTEENTH AMENDMENT DOES NOT REQUIRE THE NORTH CAROLINA DEPARTMENT OF CORRECTION TO PROVIDE COUNTY PRISONERS TRANSFERRED TO ITS CUSTODY FOR "SAFEKEEPING" WITH ELECTIVE AND UNESSENTIAL, BUT DESIRED, MEDICAL TREATMENT 11

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In The

Supreme Court of the United States

October Term, 1974

No. 74-470

GRADY D. KERSH, MAX V. ROGERS, and JIMMY A. PRICE,

Petitioners,

v.

V. LEE BOUNDS, Commissioner of the North Carolina DeRHYNE, Members of the Board of County Commissioners of Board of County Commissioners of Gaston County; W. J. PHARR, DR. CHARLES A. GLENN, E. A. FRONEBERGER, POLIE Q. CLONINGER, JR. and CHARLES A. partment of Correction; C. GRIER BEAM, Chairman of the Gaston County; THEODORE L. BURRELL, Chairman of the Board of County Commissioners of Polk County, BILLY HUGH RUFF and PHILLIP WALKER, Members of the Board of County Commissioners of Polk County,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported as BOUNDS v. KERSH, 501 F. 2d 585 (4th Cir. 1974).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. ARE PRISONERS HELD ON "SAFEKEEPING" STATUS UNDER THE CARE AND CUSTODY OF THE NORTH CAROLINA DEPARTMENT OF CORRECTION DENIED EQUAL PROTECTION OF THE LAW IN THAT THEY ARE NOT PROVIDED MEDICAL TREATMENT EQUIVALENT TO THAT PROVIDED ALL PRISONERS UNDER THE CARE AND CUSTODY OF THE DEPARTMENT OF CORRECTION?

II. ARE PRISONERS HELD ON "SAFEKEEPING" STATUS BY THE NORTH CAROLINA DEPARTMENT OF CORRECTION DENIED DUE PROCESS BECAUSE THEY ARE NOT GIVEN THE MEDICAL TREATMENT PRESCRIBED FOR THEM BY THEIR PHYSICIANS?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States and North Carolina General Statutes 15-183, 148-29 and 162-39 (formerly 153-189.1).[1]

STATEMENT OF THE CASE AND FACTS

This suit was brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983, by three indigent inmates of the North Carolina Department of Correction against V. Lee Bounds, Commissioner of the Department of Correction, and Members of the Boards of Commissioners of Gaston and Polk Counties, North Carolina. The prisoners alleged that the Defendants had treated prisoners in safekeeping status, called safekeepers, normally housed in county jails at county expense, differently from the regular inmates under the custody and control of the Department insofar as their request for elective, non-essential

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1 North Carolina General Statutes 15-183, 148-29 and 162-39 appear at pp 3-8 of the Petition for Writ of Certiorari filed in this case on October 22, 1974.

medical services are concerned. They allege that as safekeepers they have suffered cruel and unusual punishment in violation of the Eighth Amendment and that this discrimination ran afoul of the Fourteenth Amendment Equal Protection Clause. The case was tried, without a jury, on stipulations of fact, the District Court concluding that the prisoners did not prove cruel and unusual punishment, but that the State had no rational basis for such classification among prisoners, and violated the Equal Protection Clause by so doing. The Defendants were ordered not to treat the safekeepers differently in any medical matter from other prisoners generally, and each Plaintiff was awarded $1.00 as nominal damages. KERSH v. BOUNDS, 364 F. Supp. 590 (W.D.N.C. 1973). The Defendants appealed and the Fourth Circuit Court of Appeals reversed the District Court finding that the State had, in fact, a rational basis for the classification. BOUNDS v. KERSH, 501 F. 2d 585 (4th Cir. 1974).

WHAT IS A SAFEKEEPER?

Grady D. Kersh and Max V. Rogers were placed in the custody of the North Carolina Department of Correction for appellate "safekeeping" pursuant to the provisions of N.C.G.S. 15-183.[2] Jimmy A. Price was placed in the custody of the North Carolina Department of Correction for pretrial "safekeeping" pursuant to the provisions of N.C.G.S. 153-189.1.[3] The North Carolina Department of Correction is charged by law with the custody and control of all prisoners serving sentences in the State prison system. N.C.G.S. 148-4: However, according to N.C.G.S. 15-184, when an appeal is taken and perfected, that immediately serves as a stay of execution. Therefore, the person whose conviction is on appeal is not a prisoner serving a sentence in the State prison system.

For the trial of this cause, it was stipulated by the parties that:

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2. See p 3 of the Petitioners' Brief.

3. See pp 4-8 of the Petitioners' Brief.

"24. Criminal defendants awaiting trial in Superior Courts in North Carolina, and awaiting the outcome of appeals from convictions and sentences in Superior Courts in North Carolina, are ordinarily in the custody of the sheriff of the county in which the Superior Court having *the jurisdiction over the defendant is or has been held*, but by virtue of the provisions of G. S. 153-189.1 with respect to county prisoners generally and of G. S. 15-183 with respect to county prisoners on appeal, and pursuant to these statutes these prisoners may be transferred to the custody of the North Carolina Department of Correction. By virtue of G. S. 15-184 when an appeal is taken and perfected, execution of the sentence is stayed. According to G. S. 148-4 the North Carolina Department of Correction is charged with the custody and control of all prisoners serving sentences in the State Prison system. Therefore, prisoners who have not been convicted in Superior Courts, and those whose appeals from convictions in Superior Courts are pending, are not serving sentences in the State Prison system. It is provided in G. S. 148-29 that the State is not liable for the expenses of maintaining prisoners until they have been received by the State Prison Department. It is provided in G. S. 153-189.1 that the county from which a prisoner is transferred to the North Carolina Department of Correction, for safekeeping pending trial, shall pay to the Department of Correction the cost of maintaining the prisoner.

* * *

"26. County prisoners placed in the custody of the North Carolina Department of Correction pursuant to the provisions of N.C.G.S. 15-183 and N.C.G.S. 153-189.1 are subject to immediate release from the North Carolina Department of Correction. They may be released and returned to the custody of the sheriff of the county from which they had been forwarded upon receipt of an

order requiring their return for trial or upon the posting of the necessary appearance bond."

THE SAFEKEEPERS

I.

JIMMY A. PRICE

Jimmy A. Price, who had been committed to the custody of the North Carolina Department of Correction as the result of various convictions in the Courts of Gaston and Mecklenburg Counties, escaped from the custody of the North Carolina Department of Correction on March 3, 1970. While on escape he went to Florida, where, under the alias of Bobby Jim Stone, he was convicted of breaking, entering and petty larceny, sentenced to a term of two years and committed to the custody of the Florida Division of Corrections. An Executive Agreement was entered into between the Honorable Robert W. Scott, Governor of the State of North Carolina, and Honorable Reubin O'D. Askew, Governor of the State of Florida, for the temporary extradition of Jimmy Avery Price, alias Bobby Jim Stone, to the State of North Carolina, to stand trial upon the charge of felonious escape pending in the Gaston County Superior Court. On June 2, 1971, temporary custody of Jimmy A. Price was obtained by an agent of the State of North Carolina at the Raiford State Prison, Raiford, Florida, and Price was returned to Gaston County to stand trial. By Order dated June 17, 1971, Honorable William T. Grist, Judge Presiding in the Gaston County Superior Court, ordered that Jimmy A. Price, ". . . be removed from the Gaston County Jail and sent to Central Prison, Raleigh, N. C., for safekeeping for the reason that the Defendant has on previous occasions attempted an escape and has actually escaped from the North Carolina Department of Correction on past occasions and at the present time is before the Court on an alleged offense of escape . . ." Jimmy Price was tried and convicted in Gaston County Superior Court of the felony of escape on October 7, 1971, and sentenced to a term of two years. As required by the Executive

Agreement between the Governors of the States of North Carolina and Florida. Price was returned to the custody of the Florida Department of Corrections on October 11, 1971, to complete the service of the sentence he was serving in the State of Florida. He was returned to the custody of the North Carolina Department of Correction on December 22, 1971, at the completion of the service of the sentence in Florida. Price's final release date from the North Carolina Department of Correction was April 29, 1973, and he had been on temporary parole since February 6, 1973, and remained in that status until his release date.

II.

GRADY D. KERSH

Grady D. Kersh was convicted of possession of burglary tools in the Polk County Superior Court on January 26, 1970. On February 1, 1970, Kersh was received as a "safekeeper" by the North Carolina Department of Correction from the Sheriff of Polk County pending the outcome of his appeal to the North Carolina Court of Appeals. The trial court had entered an Order on January 28, 1970, finding that Kersh was not an indigent and allowing him 45 days to appeal. The appeal was not perfected and Kersh was subsequently to petition for certiorari after the expiration of his appeal date. On August 4, 1971, the North Carolina Court of Appeals affirmed his conviction, STATE v. KERSH, 12 N.C. App. 80, 182 S.E. 2d 608 (1971), and on October 5, 1971, the North Carolina Supreme Court dismissed his appeal. STATE v. KERSH, 279 N.C. 513, 183 S.E. 2d 689 (1971). Kersh was thereafter held as a committed inmate under the general custody and control of the North Carolina Department of Correction. Kersh escaped from the custody of the North Carolina Department of Correction on October 29, 1972, and his whereabouts since that date, at the time of trial and up to the present date, are unknown.

III.

MAX V. ROGERS

Max V. Rogers was convicted at the March 10, 1970 Session of the Gaston County Superior Court and placed in the custody of the North Carolina Department of Correction for "safe-keeping" pending his appeal to the North Carolina Court of Appeals. On April 16, 1970, a Writ of Habeas Corpus Ad Prosequendum was issued to the North Carolina Department of Correction by the Honorable Wilson W. Warlick, Judge of the United States District Court for the Western District of North Carolina, requiring the State of North Carolina to have Max Vinson Rogers before the United States District Court for the Western District of North Carolina, Shelby Division, to stand trial upon a charge of possession of non-taxpaid whiskey. Rogers was convicted, sentenced to a term of 18 months to run concurrently with the State term and returned to the custody of the North Carolina Department of Correction on April 23, 1970. On November 18, 1970, the North Carolina Court of Appeals ordered a new trial because of an error in a portion of the trial judge's instructions to the jury. STATE v. ROGERS, 9 N.C. App. 702, 177 S.E. 2d 301 (1970). Rogers was returned to the custody of Gaston County and retried at the February 1, 1971 Session of the Gaston County Superior Court. On February 11, 1971, he was again found guilty and again appealed. On Febraury 12, 1971, he was again placed as a "safe-keeper" with the North Carolina Department of Correction by Order of the Honorable Lacy H. Thornburg, Judge Presiding, Gaston County Superior Court, pending the outcome of his appeal. On August 4, 1971, the North Carolina Court of Appeals affirmed his conviction, STATE v. ROGERS, 12 N.C. App. 160, 182 S.E. 2d 660 (1971), and on October 5, 1971, the North Carolina Supreme Court dismissed his Petition for Writ of Certiorari. STATE v. ROGERS, 279 N.C. 513, 183 S.E. 2d 690 (1971). He was thereafter considered a committed inmate under the general custody of the North Carolina Department of Correction upon a Judgment and Commitment dated Octo-

ber 20, 1971, received by the Department of Correction on October 29, 1971.

MEDICAL CARE OF SAFEKEEPERS

The North Carolina Department of Correction provides reasonable medical services for inmates in both a committed and safekeeping status. Price, Kersh and Rogers, and all others similarly situated, have been and are being provided all essential medical care and treatment. In the event the medical service sought by the safekeeper is for an "elective treatment" (i.e., that which is not essential to the safekeeper's immediate welfare and poses no threat to life and limb), the Department of Correction will not perform the elective service unless the forwarding county for which the safekeeper is being maintained will acknowledge financial responsibility. The Department provides all emergency treatment required by a safekeeper and necessary medical treatment is never denied.

For the trial of this matter, the parties stipulated as follows:

"16. A determination is made by the medical staff of Central Prison Hospital, Raleigh, North Carolina, as to whether medical services for those considered 'safekeepers' are 'emergency', 'routine', or 'elective' (i.e., that which is not essential to the safekeeper's immediate welfare and poses no threat to life and limb). The North Carolina Department of Correction will not provide these 'elective' medical services until it first obtains notice that the forwarding county will accept financial responsibility for the expenses incurred in providing the 'elective' medical services.

* * *

"18. If a prisoner is a member of the regular prison population under the custody of the North Carolina Department of Correction (that is, if he is not on 'safekeeping' status), the medical staff of the North Carolina Department of Corection does not draw a distinction between

'elective', 'routine', and 'emergency' medical care, but provides all reasonable, appropriate and required medical care for such prisoners; such care includes providing the inmates with prescription corrective eye glasses, false teeth and surgical repair of hernias.

* * *

"23. Inmates forwarded to the custody of the North Carolina Department of Correction as 'safekeepers' by the counties of the State of North Carolina are provided all food, clothing and housing and emergency and routine medical services and the forwarding county is later billed for the expenses incurred."

THE SPECIFIC MEDICAL COMPLAINTS OF THE PLAINTIFF "SAFEKEEPERS"

As to Jimmy A. Price:

"7. While plaintiff Jimmy A. Price, was being held in Central Prison, on loan for trial by Executive Agreement from the Florida Division of Corrections, he was found to have a small umbilical hernia, reduction of which did not constitute an emergency or require any urgency. (Medical Report, July 14, 1971). When Jimmy A. Price was originally examined on June 22, 1971, the examining physician found that he had a '. . . loose inguinal ring—perhaps grade one of six hernia. The North Carolina Department of Correction failed and refused to give plaintiff Jimmy A. Price an operation to reduce his umbilical hernia. Upon plaintiff Jimmy A. Price's return to the North Carolina Department of Correction upon completion of the sentence being served in the Florida Division of Corrections, no hernia was found. (Medical Examination, December 23, 1971)."

As to Grady D. Kersh:

"14. On May 5, 1971, an examination of the plaintiff Grady

"D. Kersh revealed 20/25 vision in both eyes and that he was not in immediate need of glasses. (Clinic Report, May 10, 1971). When plaintiff Grady D. Kersh was examined on November 4, 1971), he was found to have 20/20 vision in both eyes (Medical Examination, November 4, 1971)."

As to Max V. Rogers:

"9. While plaintiff Max V. Rogers was considered a 'safekeeper' in Central Prison, he was in need of corrective eye glasses and false teeth . . .

* * *

"11. After plaintiff Max V. Rogers was placed in the general population he was furnished with both the false teeth and corrective eye glasses he had earlier requested. On November 1, 1971, plaintiff Max V. Rogers was referred to the Dental Clinic at North Carolina Central Prison. On November 2, 1971, he was examined and an initial impression for full upper and lower dentures was prepared. A final impression and shading was made on November 8, 1971, and the plaintiff was recalled for adjustment on December 15, 1971, to fit the dentures. The dentures were seated on December 16, 1971, and the plaintiff Max V. Rogers was called for adjustment on December 17, 1971. On October 29, 1971, plaintiff Max V. Rogers was fitted with corrective eye glasses at North Carolina Central Prison."

* * *

"25. . . . In addition to the foregoing, plaintiff Max V. Rogers has on four occasions been seen by and consulted with a psychiatrist furnished him by the North Carolina Department of Correction. These consultations were carried out while Max V. Rogers was on safekeeping status."

ARGUMENT

I.

THE FOURTEENTH AMENDMENT DOES NOT REQUIRE THE NORTH CAROLINA DEPARTMENT OF CORRECTION TO PROVIDE COUNTY PRISONERS TRANSFERRED TO ITS CUSTODY FOR "SAFEKEEPING" WITH ELECTIVE AND UNESSENTIAL, BUT DESIRED, MEDICAL TREATMENT.

Nowhere in the case law is to be found the application of the Fourteenth Amendment to a § 1983 action for alleged denial of equal medical treatment by prison inmates. The Eighth Amendment is the only appropriate basis under which a colorable consitutional claim is presented where the inmate's complaint is of improper or inadequate medical care. GITTLEMACKER v. PRASSE, 428 F. 2d 1, 6 (3rd Cir. 1970).

The essential contention lodged in the Complaint is that the Defendants failed to provide the medical services to which the Plaintiffs believed themselves entitled. In this regard, the deprivation of essential medical care for state penal inmates may, in the proper case, depending on all the facts and circumstances, raise an issue cognizable by the federal courts under § 1983. EDWARDS v. DUNCAN, 355 F. 2d 993 (4th Cir. 1966); HIRONS v. DIRECTOR, 351 F. 2d 613 (4th Cir. 1965). It is also apparent that such actions are not maintainable unless the deprivation alleged is of such a demonstrably serious nature to be realistically characterized as a genuine threat to life and limb, thereby raising potential Eighth Amendment questions. For cases so holding, see DAREY v. SANDRITTER, 355 F. 2d 22 (9th Cir. 1965); SNOW v. GLADDEN, 338 F. 2d 999 (9th Cir. 1964); UNITED STATES ex rel KNIGHT v. RAGEN, 337 F. 2d 425 (7th Cir. 1964), cert. denied, 380 U.S. 985, 85 S. Ct. 1355, 14 L. Ed. 2d 277 (1965); THREATT v. NORTH CAROLINA, 221 F. Supp. 858 (W.D.N.C. 1963).

In the case of STILTNER v. RHAY, 371 F. 2d 420 (9th Cir. 1967), the prisoner, who was suffering from a chronic back injury and who had been permitted on many occasions to visit the prison hospital where he was occasionally given medication or physical therapy, filed suit under the Civil Rights Act alleging inadequate medical care and treatment. In affirming the District Court's dismissal of the action without a hearing, the Court quoted favorably from SNOW v. GLADDEN, supra, stating:

> "We find no showing here of inadequate medical care and treatment that would justify federal intervention."

To a like effect, see the case of THOMPSON v. BLACKWELL, 374 F. 2d 945 (5th Cir. 1967), where the Court said:

> "It affirmatively appears in the papers before us that appellant was afforded medical attention . . . His allegations do not rise to the level of stating facts which would make out a case of an abuse of discretion on the part of the prison authorities."

It is patently clear on the rare occasions when the federal courts have entertained civil rights suits grounded on allegations of medical deprivation, the cases have amply demonstrated a virtual abdication by the State of its responsibility for providing reasonable medical services for its prisoner inmates. See HUGHES v. NOBLE, 295 F. 2d 495 (5th Cir. 1961); COLEMAN v. JOHNSTON, 247 F. 2d 273 (7th Cir. 1957); and REDDING v. PATE, 220 F. Supp. 124 (N.D. Ill. 1963). It is submitted that the allegations related in the Complaint cannot reasonably be equated with those lodged in HUGHES, COLEMAN and REDDING.

While the protection provided by the United States Constitution for state prisoners' right to medical care does not hinge alone upon the specific intent or wilfullness with which a party acting under color of state law may deny them, see MONROE v. PAPE, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961),

§ 1983 likewise does not authorize federal courts to interfere in the ordinary medical practices or other matters of internal discipline of state prisons. UNITED STATES ex rel LAWRENCE v. RAGEN, 323 F. 2d 410 (7th Cir. 1963). Whether a complaint claiming failure to provide medical care is deemed to allege a denial of due process under the Fourteenth Amendment, McCOLLUM v. MAYFIELD, 130 F. Supp. 112 (N.D. Cal. 1955); Cf. HIRONS v. DIRECTOR, 351 F. 2d 613 (4th Cir. 1965), or cruel or unusual punishment violating the Eighth Amendment, WRIGHT v. McMANN, 387 F. 2d 519 (2nd Cir. 1967); COPPINGER v. TOWNSEND, 398 F. 2d 392 (10th Cir. 1968), it must suggest the possibility of some "conduct that shocks the conscience", ROCHIN v. CALIFORNIA, 324 U.S. 165, 172, 72 S. Ct. 205, 96 L. Ed. 183, 25 ALR 2d 1396 (1952), or "barbarous acts", ROBINSON v. CALIFORNIA, 370 U.S. 660, 676, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962); BEARD v. LEE, 396 F. 2d 749 (5th Cir. 1968). While a prisoner is entitled to reasonable medical care, HIRONS v. DIRECTOR, supra, a difference of opinion between a physician and patient as to the scope of required medical care does not give rise to a constitutional right or claim under § 1983. COPPINGER v. TOWNSEND, supra. "The prisoner cannot be the ultimate judge of what medical treatment is necessary or proper for his care." CATES v. CICCONE, 422 F. 2d 926, 928 (8th Cir. 1970).

The following recent cases also support the contention that neither the complaint nor the stipulation filed in this case allege or show any facts which indicate that the prisoners' health was in jeopardy or that they were in need of, and being denied, essential medical care giving rise to and sustaining an action under § 1983. ROY v. WAINWRIGHT, 418 F. 2d 231 (5th Cir. 1969); WEAVER v. BETO, 429 F. 2d 505 (5th Cir. 1970); HASKEW v. WAINWRIGHT, 429 F. 2d 525 (5th Cir. 1970); OAKES v. WAINWRIGHT, 430 F. 2d 241 (5th Cir. 1970); SANDERS v. UNITED STATES, 438 F. 2d 918 (5th Cir. 1971). See, also, WEBB v. OSWALD, 334 F. Supp. 993 (S.D.-

N.Y. 1971); PANIAGUA v. MOSELEY, 451 F. 2d 228 (10th Cir. 1971). "Our attention has not been directed to any case which has afforded relief of the particular type sought here, namely an Order of Court that a warden of a penal institution presumably acting through the prison medical staff, perform surgery on a prison inmate. To us it is not surprising that there is an apparent lack of precedent for court ordered surgery." PANIAGUA v. MOSELEY, supra, at 229.

II.

THERE EXISTS A VALID STATE INTEREST IN THE CLASSIFICATION OF "SAFEKEEPERS" AND THE DENIAL OF ELECTIVE, NON-ESSENTIAL MEDICAL SERVICES WITHOUT THE APPROVAL OF THE COUNTY FOR WHICH THE "SAFEKEEPER" IS BEING HELD.

The District Court's opinion does not reflect the novelty and complexity of the constitutional questions posed by the inmates' challenge to "safekeeping". In concluding that all inmates must be equally treated, whether in a "safekeeping" or committed status, the District Court relied on "equal protection" decisions. However, the uniqueness of this case precludes the easy application of the equal protection clause. And, although the District Court finds the classification between "safekeeper" and committed inmate to be suspect, the District Court's simplistic process of analysis is not persuasive. Before a state's law and the justifications for the classifications they create are subjected to strict judicial scrutiny, threshold considerations must be analyzed more closely than they were in the District Court.

The following stipulations are directly involved in a consideration of the "equal protection" issue:

"23. Inmates forwarded to the custody of the North Carolina Department of Correction as 'safekeepers' by the counties of the State of North Carolina are provided all

food, clothing and housing and emergency and routine medical services and the forwarding county is later billed for the expenses incurred.

"24. Criminal defendants awaiting trial in Superior Courts in North Carolina, and awaiting the outcome of appeals from convictions and sentences in Superior Courts in North Carolina, are ordinarily in the custody of the sheriff of the county in which the Superior Court having the jurisdiction over the defendant is or has been held, but by virtue of the provisions of G. S. 153-189.1 with respect to county prisoners generally and of G. S. 15-183 with respect to county prisoners on appeal, and pursuant to these statutes these prisoners may be transferred to the custody of the North Carolina Department of Correction. By virtue of G. S. 15-184 when an appeal is taken and perfected, execution of the sentence is stayed. According to G. S. 148-4 the North Carolina Department of Correction is charged with the custody and control of all prisoners serving sentences in the State prison system. Therefore, prisoners who have not been convicted in Superior Courts, and those whose appeals from convictions in Superior Courts are pending, are not serving sentences in the State prison system. It is provided in G. S. 148-29 that the State is not liable for the expenses of maintaining prisoners until they have been received by the State prison department. It is provided in G. S. 153-189.1 that the county from which a prisoner is transferred to the North Carolina Department of Correction, for safekeeping pending trial, shall pay to the Department of Correction the cost of maintaining the prisoner.

* * *

"26. County prisoners placed in the custody of the North Carolina Department of Correction pursuant to the provisions of N.C.G.S. 15-183 and N.C.G.S. 153-189.1

> are subject to immediate release from the North Carolina Department of Correction. They may be released and returned to the custody of the sheriff of the county from which they had been forwarded upon receipt of an order requiring their return for trial or upon the posting of the necessary appearance bond."

The District Court cites SHAPIRO v. THOMPSON, 394 U.S. 618 (1969) as the constitutional basis for the application of the equal protection clause of the Fourteenth Amendment. However, in SAN ANTONIO INDEPENDENT SCHOOL v. RODRIGUEZ, 411 U.S. 1 (1973), in which the Plaintiffs relied upon SHAPIRO, this Court held that education, unlike the right to inter-state travel, is not a fundamental constitutional right and that the equal protection clause does not convert it into one. "But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause." SAN ANTONIO INDEPENDENT SCHOOL DISTRICT v. RODRIGUEZ, at p. 30. "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." SAN ANTONIO INDEPENDENT SCHOOL DISTRICT v. RODRIGUEZ, at p. 33.

The applicable constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest. McGINNIS v. ROYSTER, 410 U.S. 263 (1973). As this Court stated in McGINNIS v. ROYSTER, supra, at p. 276;

> ". . . Yet, our decisions do not authorize courts to pick and choose among legitimate legislative aims to determine which is primary and which is subordinate. Rather, legislative solutions must be respected if the 'distinctions drawn have some basis in practical experience', . . ., or if some legitimate state interest is advanced, . . . So long as the state purpose upholding a statutory class is legitimate and nonillusory, its lack of primacy is not disqualifying.

> "When classifications do not call for strict judicial scrutiny, this is the only approach consistent with proper judicial regard for the judgments of the Legislative Branch . . . Permitting nullification of statutory classifications based rationally on a nonprimary legislative purpose would allow courts to peruse legislative proceedings for subtle emphases supporting subjective impressions and preferences. The Equal Protection Clause does not countenance such speculative probing into the purposes of a coordinate branch. We have supplied no imaginary basis or purpose for the statutory scheme, but we likewise refuse to discard a clear and legitimate purpose because the court below perceived another to be primary.
>
> "The challenged classification here rationally promotes the legitimate desire of the state legislature . . ."

The Tenth Amendment to the Constitution of the United States provides that:

> "The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectfully, or to the people."

One of the powers thus reserved to the states is the power to structure their internal government. Clearly, determinations as to custody of prisoners is within the rights reserved to the states under the Tenth Amendment. "When a state exercises power wholly within the domain of state interest, it is insulated from federal judicial review." GOMILLION v. LIGHTFOOT, 364 U.S. 339, 347, 81 S. Ct. 125, 130, 5 L. Ed. 2d 110 (1960). Cf. BRADLEY v. SCHOOL BOARD, 462 F. 2d 1958 (4th Cir. 1972).

It is respectfully submitted that a constitutional violation cannot be discerned in the establishment of both county jails and state prisons, nor is there any constitutional consequence of such maintenance. The District Court's disregard of these valid classifications was beyond its authority to so order,

basing a decision solely upon the Equal Protection Clause of the Fourteenth Amendment.

It is submitted that the District Court failed to take into consideration the teachings of this Court in SAN ANTONIO INDEPENDENT SCHOOL DISTRICT v. RODRIGUEZ, supra, and McGINNIS v. ROYSTER, supra. Furhermore, the District Court misconceived an essential element to any equal protection challenge: The alleged invidious discrimination must be against one person in favor of another person or class of persons with no rational basis for any differentiation in treatment. BURNS v. SWENSON, 430 F. 2d 771 (8th Cir. 1970). The application of McGINNIS to the facts in this case clearly reveals the establishment of legitimate statutory classes which "rationally promotes legitimate desire of the state legislature . . ." McGINNIS v. ROYSTER, supra, at 277.

As the Fourth Circuit Court of Appeals holds in reversing the District Court:

> "We note that the Plaintiffs admittedly have been furnished with both routine and emergency medical care. Failure to furnish other and additional elective medical care, which is not essential to the immediate welfare of the prisoners and a lack of which poses no threat to life or limb, we do not think is irrational. It may not be seriously contended that any prisoner detained for however short a period is entitled to have all his needed elective medical care performed while in custody, and it may not be argued that the state is not entitled to set some standard as to which prisoners shall receive the care. When we remember that safekeepers are in the custody of the Department only five months, half that of misdemeanants and less than one-tenth that of felons, and that safekeepers are essentially county prisoners, only being housed by the state on a temporary basis we do not think North Carolina has acted in an irrational, arbitrary or capricious manner toward him. To the contrary, we are of the opinion that their

treatment so far as medical care is concerned is both reasonable and rational and free from constitutional infirmity.

"In sum, we can find nothing arbitrary, capricious or irrational in this state procedure. . . . Although set in a different context, we think the language of the Court in ROSS v. MOFFITT, No. 73-786, 42 L.W. 4940, 4943, —— U.S. —— (June 17, 1974), is persuasive: 'Despite the tendency of all rights "to declare themselves absolute to their logical extreme," there are obviously limits which the equal protection analysis may not be pressed without doing violence to the principles recognized in other decisions of this Court. The Fourteenth Amendment "does not require absolute equality or precisely equal advantages".' . . ." BOUNDS v. KERSCH, supra, at 590.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Fourth Circuit Court of Appeals properly reversed the District Court and that the Petition for Writ of Certiorari sought in this case should be denied.

Respectfully submitted,

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